I acknowledge your emails of 9 August 2020, 17 August 2020 and 9 September 2020 in which you remarked on, or made requests for information about, your disclosure under the *Public Interest Disclosure Act 2013* (PID Act) and the Ombudsman's role in it.

You have concerns about how this Office has played its part as the agency responsible for obligations and functions supporting the operation of the PID Act. To that end you made a Service Delivery complaint on 9 August 2020.

I am the officer assigned to manage your Service Delivery complaint.

**Substantive disclosure**
We are open to considering an investigation of the APSC's actions in processing your disclosure. That could be done as an investigation under the *Ombudsman Act 1976* (Ombudsman Act) should you request an investigations and should we choose to investigate.

Please bear in mind that s 6(4)(a) of the Ombudsman Act permits this Office to exercise discretion not to investigate if the action is being reviewed by the agency (APSC) at the request of the complainant, as is the case here. In these circumstances we would normally not investigate until the agency has finalised all steps in its process and provided a report.

You say that you were let down because of a failure by the APSC to comply with its own procedure in paragraph 8.3 of the *APSC Public Interest Disclosure Procedures* (Disclosure Procedures) where the views of the discloser should be sought prior to seeking an extension of time.

I am unable to form a concluded view on the specific issue of how the APSC decided it needed more time to finalise the PID as I have not examined in detail the APSC's reasoning and would not do so until the APSC has completed the PID process.

Nevertheless, it is settled that while not every departure from a stated intention necessarily involves unfairness, even if it defeats an expectation, in some contexts, the existence of a legitimate expectation as to procedure may enliven an obligation to extend procedural fairness (*Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6). What that means in practice is another issue.

If, on completion of the APSC investigation, you raise an Ombudsman complaint that investigation, then this is an issue you could include, along with a statement setting out the prejudice the delay has caused you.

**Your Service Delivery complaint about us**
On 9 August 2020 you wrote:

> ...
> I want to lodge a complaint about the way you have handled the APSC's request for an extension of time.
> ...

As you have asked for ADJR Act reasons for our decision, I will not elaborate in this response.

Thank you for the views you provided on the PID legislation and related procedures. Your commentary may be of assistance when we revise the *Agency guide to the public interest disclosure Act 2013*.

In addition you raised a range of questions and made statements about law and policy. I do not intend to address specific issues for the reasons given below, but note that you raised:

- The scale and complexity of the materials provided to the APSC. I acknowledge your view on the scale and complexity of the matters you submitted to the APSC. However, your view is necessarily subjective because there is no standard way of measuring scale and complexity in isolation from other factors that may have been in play, such as existing volumes of work and staff availability and skills. Therefore, while I acknowledge your views, scale and complexity cannot be dismissed as factors in influencing the time taken to reach a decision.

- Analysis of a number of scenarios by hypothetical reasoning. This Office is obliged to deal with matters of fact arising from actions of the agencies within jurisdiction (see s 5(1(a) and (b) of the *Ombudsman Act 1976*). Administrative decisions often include the exercise of discretion. Discretion exists when the decision-maker has the power to make a choice about whether to act or not act, to approve or not approve, or to approve with conditions. We deal in real choices and complex fact situations, whereas hypothetical scenarios strip contextual information out. It would be contrary to good public policy to engage in hypothetical discussions because the outcomes would likely be misplaced if not misleading.

- Performance issues of a specific member of staff. I am unable to comment on the performance of an individual member of staff. This is because I am not the officer's supervisor and I do not have responsibility for the officer's performance under the Ombudsman's *Enterprise agreement*. Furthermore, the *Australian Privacy Principles* (APP) would be a barrier to me discussing an individual's performance with you. For example, APP 11 requires me to take reasonable steps to protect the information from misuse, interference and loss, as well as unauthorised access, modification or disclosure. Should I release information to you it would be uncontrolled information with the potential for its further release into the community unacceptably compromising the officer's privacy. Therefore, I have no view on the matters you raised and it would be improper for me to form any.

- Legal issues. *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6 is authority for the proposition that it is a mistake to assimilate decision-making by officers of the executive with judicial decision making. Administrative decisions are not made in the same way as decisions made by courts and perhaps tribunals. Many of your propositions are legalistic and I am unable by convention to offer you legal advice. Suffice to say it is well established in Australia that an administrative decision-maker is free to disregard formal rules of evidence in receiving material and forms a view from satisfaction to the existence of facts. In the circumstances, reasonable minds may reasonably differ on what is a fact. And legalism is not central to administrative decision-making.

**Time taken to respond to you**

To clarify the issue of the timing of our responses to you, there is no statutory obligation under the Ombudsman Act to do respond to an approach within a specific time. We aim to respond within a reasonable time, which takes into account any number of factors that may affect the work of the Office overall.

**Your further correspondence with this Office**

In your 17 August 2020 email you set out your expectations about turn-around-times for your Service Delivery complaint.

In the first email of 9 September 2020 you sought an answer to why a deadline you had provided had passed without this Office first letting you know it was not to be met. I have apologised by email for not better managing your expectations.

In the second email of 9 September 2020 you expressed disappointment at not receiving information from this Office Service Delivery complaint and you asked for a statement of reasons under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). I have asked the original decision-maker to prepare reasons under s 13 and 13A of the ADJR Act.

**Conclusion**
I hope that this response to your Service Delivery complaint clarifies areas where you may have not understood our role or approach to our responsibilities under both the PID and Ombudsman Acts.

There may be some issues that you think I could have addressed specifically and in detail in this response, but it is not a requirement to address each every issue you raised (*Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1995] QCA 187).

You are welcome to call me to discuss this matter.

ends

9 August 2020 email

Dear Mr Davis,

I refer to your email, and the attachment to that email, of 7 August 2020.

The attachment to the email contains a record of your decision to grant the Australian Public Service Commission (**APSC**) an extension of time pursuant to section 52 of the *Public Service Disclosure Act 2013* (Cth) (**PID Act**).

In your record of decision, you note:

> If upon the finalisation of the investigation and receipt of the investigation report you are unhappy with the outcome, it is open to you to make a complaint to our Office about the APSC's handling of your PID.

While I may end up formally complaining about the way the APSC has handled my disclosure at the end of the investigation process, I want to lodge a complaint about the way you have handled the APSC's request for an extension of time. To that end, please pass this email of complaint to your supervisor, or the most appropriate officer, for consideration and response.

I am disappointed with the record of your decision. I set out my reasons below.

**1. Reasons for complaint**

1.1 Introductory comments about seeking extensions of time

Subsection 52(3) of the PID Act provides:

> If the agency is not the IGIS or an intelligence agency, the Ombudsman may extend, or further extend, the 90-day period by such additional period (which may exceed 90 days) as the Ombudsman considers appropriate:
>
> (a) on the Ombudsman's own initiative;
>
> (b) if the agency is not the Ombudsman—on application made by the principal officer of the agency; or
>
> (c) on application made by the discloser.

According to the record of decision provided by Mr Davis, '[o]n 29 July 2020, the APSC applied for an extension of time, until 9 November 2020.'

Presumably, the application for an extension of time was made using *Form 3 – Extension of time to investigate a PID* (**Form 3**).

That form contains various sections for completion.

The sections are:

1. agency information;
2. discloser details; and
3. extension request details.

Under section 3, there are several subsections that can be completed. Those subsections are:

- estimated length of investigation provided to discloser;
- length of extension sought;
- reason for extension;
- action taken to progress investigation to date;
- details of previous requests for extensions that were sought from the Ombudsman for this matter; and
- the discloser's views on the request for extension, if provided.

According to Form 3, '[a]gencies are not required to consult with the discloser prior to applying for an extension, however we encourage agencies to communicate regularly with the discloser about the progress of an investigation.'

On the face of Form 3, there appears to be no obligation for the principal officer of a Department or agency, or his or her delegate, to consult with a discloser prior to applying for an extension. That being said, clause 8.3 of the Public Interest Disclosure Procedures issued by the Australian Public Service Commissioner on 21 September 2018 pursuant to section 59 of the PID Act provides:

> … An application for extension should include reasons why the investigation cannot be completed within the time limit, the views of the discloser and an outline of action taken to progress the investigation …

The provision of the views of a discloser about an extension of time reasonably presupposes that the discloser would be notified that an extension of time will be sought. Accordingly, there is an argument (and a strong one, in my opinion) that, as a matter of policy, the principal officer of the APSC, or his delegate, should have notified me that he or she was going to seek an extension of time.

According to clause 9.1.4 of the *Agency Guide to the Public Interest Disclosure Act 2013* (**Agency Guide**), a document that 'has been developed to assist Commonwealth Agencies fulfil their obligations under the [PID Act] and [PID Standard]' and '[suggests] best practice for handling public interest disclosures' (according to the Ombudsman's website - https://www.ombudsman.gov.au/Our-responsibilities/making-a-disclosure/Tools-and-Resources):

> … The Ombudsman will take into account a range of other factors including the availability of witnesses; the complexity of the investigation; the action already taken to progress it; and whether there have been any unreasonable or unexplained delays on the part of the agency. The Ombudsman will also take into account any views expressed by the discloser about the requested extension …

It is also worth noting that, according to clause 9.1.4 of the Agency Guide:

> … Agencies are encouraged to let the discloser know before they apply for an extension, and take the opportunity to explain why it is required and the steps that need to be taken to complete the investigation …

It seems that, as a matter of APSC policy and best practice, the principal officer of the APSC, or his delegate, should have notified me that he or she was going to 'apply for an extension, and take the opportunity to explain why it is required and the steps that need to be taken to complete the investigation.'

In completing Form 3, I assume that the principal officer of the APSC, or his delegate, did not complete the subsection relating to 'the discloser's views on the request for extension, if provided'. Such views could only be provided if the principal officer of the APSC, or his delegate, notified me that an extension of time was going to be sought. No explicit notification was provided to me.

It seems to me that, because the 'Ombudsman ***will*** also take into account any views expressed by the discloser about the requested extension' (emphasis added), where no view about an extension of time has been recorded in Form 3, the Ombudsman would make an effort to determine what that view might be so that the Ombudsman can take into account any views expressed by the discloser Otherwise, the purpose of guidance recorded in the Agency Guide would be defeated by officers in agencies adopting a substandard approach to handling PID investigations (e.g. by deliberately not notifying disclosers that applications for an extension of time will be sought

so that the views of disclosers are not recorded when application for an extension of time are made to the Ombudsman).

It seems to me misleading to claim that the Ombudsman will do something only to fail to follow through by relying on the excuse that, because the officer in the agency seeking an extension chose not to liaise with the discloser, no view was expressed and, thus, no view needed to be considered. That would be an example of rank formalism

1.2 Failure to take my views into account when making a decision

As was noted in the record of decision, my disclosure was allocated on 11 May 2020 (having been made to the Commonwealth Ombudsman on 23 March 2020). It was also noted that '[o]n 29 July 2020, the APSC applied for an extension of time, until 9 November 2020.'

What is not noted in the record of decision is what happened between 11 May 2020 and 29 July 2020. Noting the probable absence of information in the subsection of Form 3 relating to 'the discloser's views on the request for extension, if provided', had any effort been made, on Mr Davis' part, to ascertain my views as to request for extension, Mr Davis would have been notified of the following:

Firstly, contrary to requirements of subsection 9(2) of the *Public Interest Disclosure Standard 2013* (Cth), the principal officer of the APSC, or his delegate, did not provide me, within 14 days after the disclosure was allocated to the APSC, or any time thereafter, with information about the principal officer's powers to:

a) decide not to investigate the disclosure made; or

b) decide not to investigate the disclosure further; or

c) decide to investigate the disclosure under a separate investigative power.

Secondly, the first time that I received any correspondence from an officer at the APSC was on 29 July 2020, the day on which a request for an extension of time was made to the Ombudsman. That correspondence was sent to me by Ms Kate McMullan, the Australian Public Service Commissioner's delegate. That is to say that the first time that I was contacted by an officer at the APSC in respect of my disclosure was on the 79th day after the disclosure was allocated by Ms Elizabeth Bennet of your office. As you are aware, subsection 50(1) of the PID Act provides:

> The principal officer of an agency must, as soon as reasonably practicable, inform the discloser of the following (whichever is applicable):
>
> (a) that the principal officer is required to investigate the disclosure;
>
> (b) that the principal officer has decided under section 48 or 49 not to investigate the disclosure under this Division, or not to investigate the disclosure further.

It strikes me as incredible that the soonest reasonably practicable moment for the Ms McMullan to notify me that that the principal officer is required to investigate my disclosure happened to be the same day that an application for an extension of time was made to the Ombudsman.

Thirdly, and related to the second point, Mr Davis would have been alerted to the fact that, in the communication sent to me on 29 July 2020 (see Attachment A to this email), Ms McMullan stated the following:

> As a delegate of the principal officer of the Australian Public Service Commissioner, I am writing to notify you under section 50 of the Public Interest Disclosure Act 2013 that I am investigating your disclosure, following allocation by the Commonwealth Ombudsman on 11 May 2020. At this stage, I estimate that the investigation will take 180 days to complete, mainly due to the volume of material provided.
>
> Please note that I am unable to provide you with any other information about the investigation of your disclosure at this time and the progress of an investigation can depend on a range of factors. However, I will contact you if I require any further information from you.
>
> If you have any queries about your disclosure, please direct them to PID@apsc.gov.au.

Shorn of salutations and valedictions, those five sentences contain the entirety of correspondence that I have received from anybody at the APSC since my disclosure was allocated to the APSC on 11 May 2020.

Importantly, I was told, on the 79th day after the disclosure was allocated by Ms Elizabeth Bennet, that Ms McMullan was 'unable to provide [me] with any other information about the investigation of [my] disclosure at this time' and that she would contact me if she required any further information. No attempt was made to notify me that a request for an extension of time would be made to the Ombudsman. No attempt was made to solicit my views about such a request. No attempt was made to notify of what, if any, progress had been made with the investigation.

Fourthly, I would have drawn to Mr Davis' attention the APSC's internal policy documents that require APSC officials seeking extensions of time from the Ombudsman to investigate disclosures to provide the views of a discloser about requests for an extension of time, and how providing the views of a discloser about requests for an extension of time reasonably presupposes that the discloser would be notified that an extension of time would be sought.

Fifthly, I would have drawn Mr Davis' attention to the fact that, demonstrably, Ms McMullan has not given any consideration to the clause 7.5.1 of the Agency Guide or, if she has, has disregarded that guidance.

Sixthly, I would have drawn what I consider to be the unreasonable or unexplained delays, on Ms McMullan's part, to Mr Davis' attention so that he would have considered those factors in his assessment, as clause 9.1.4 of the Agency Guide suggests he would.

As the delegate of the Ombudsman, Mr Davis did not 'take into account any views expressed by the discloser about the requested extension' because:

a) despite the reasonable implication existing in the clause 8.3 of the Public Interest Disclosure Procedures issued by the Australian Public Service Commissioner on 21 September 2018, the person who applied for an extension of time from the Ombudsman did not notify me that they would do so; and

b) I was not granted an opportunity to express my views to the principal officer's delegate about an application for an extension of time (as I was not notified about any application for an extension of time); and

c) despite no view being communicated to Mr Davis on the part of the person applying for an extension of time about my views on the application for an extension of time, Mr Davis made no attempt to ascertain my views; and

d) Mr Davis chose to, in effect, reward the lazy position taken by the APSC official applying for an extension of time by allowing the omission of views in the subsection relating to 'the discloser's views on the request for extension, if provided' on Form 3 to pass (I suspect on the basis that because no view was recorded, no view must have been provided, even though the questions 'were views sought?' or 'was the discloser notified that a request for an extension of time would be sought?' were probably overlooked).

Despite making a decision that affects my interests (e.g. the certainty of the timely disposition of an investigation into allegations of contraventions of the *Public Service Act 1999*) and, possibly, my rights (at least in respect of making an external disclosure under the PID Act following what may have been substandard handling of my disclosure on the part of Ms McMullan), Mr Davis has done so without providing me with an opportunity to put my views to him.

1.3 Concerns about the decision

In the record of decision, Mr Davis states:

> I considered that the time requested is reasonable in all the circumstances and have decided to grant an extension under section 52 of the Public Interest Disclosure Act 2013. In reaching my decision, I took into account the APSC's advice on the following factors:
>
> - the disclosure is relatively complex and involves a large volume of documents (897 pages), which has taken some time to consider;

- that the allegations relate to a third party, which the APSC will need to consult to assist its investigation; and

- that the APSC has experienced a large increase in workload due to the COVID-19 response.

Before I address the factors that Mr Davis took into account in the record of his decision, I would like to note what factors Mr Davis did not take into account.

According to clause 9.1.4 of the Agency Guide:

> … The Ombudsman will not automatically grant an application for an extension. Each request is separately considered to determine if the additional time requested is reasonably necessary to ensure that the disclosure is properly investigated. The Ombudsman will also take into account a range of other factors including the availability of witnesses; the complexity of the investigation; the action already taken to progress it; and whether there have been any unreasonable or unexplained delays on the part of the agency …

Those factors, and others, are also referred to in a passage recorded on Form 3 under the subheading 'How does the Ombudsman assess the request?', with that passage reading:

> The Ombudsman will take into account all relevant information, including:
>
> - the length of the extension sought
> - the reasons for the extension
> - the progress of the investigation
> - the number of previous extension requests
> - the discloser's views on the request, if any.
>
> The Ombudsman may decline to grant an extension request where an agency has not provided clear reasons for the request, or where the investigation appears to have been subject to unreasonable or unexplained delay.

Clause 9.1.4 suggests that Mr Davis would have considered whether the additional time requested would be **reasonably necessary** to ensure that the disclosure would be properly investigated. It seems to me that if Mr Davis were to merely 'rubber stamp' the request for an extension of time on the basis of what was put to him, he would not have brought the independence of mind contemplated by the statement '[e]ach request is separately considered to determine if the additional time requested is reasonably necessary to ensure that the disclosure is properly investigated.'

Clause 9.1.4 provides that the Ombudsman **will** take a range of factors into account, including 'the action already taken to progress [the investigation of the disclosure]' and 'whether there have been any unreasonable or unexplained delays on the part of the agency.' I have emphasised the word 'will' because the modal verb 'will' expresses obligation or necessity. The modality does not express mere permissibility or discretion.

On the face of the record of decision, it does not appear that Mr Davis did take the aforementioned factors (in the preceding paragraph) into account when making his decision. If he did, that is not manifested in the record of decision and, in my opinion, the record of decision is, in that respect, deficient, and the reasons provided pursuant to paragraph 52(5)(a) of the PID Act, insufficient.

*1.3.1 The disclosure is relatively complex and involves a large volume of documents (897 pages), which has taken some time to consider*

I accept that the disclosure may be relatively complex, the key word being 'relatively'. The term complex can be used to refer to various aspects of the disclosure. For example, one might refer to a disclosure as being complex because the disclosure is about several incidents, or relates to several people. One might refer to a disclosure as complex because the disclosure in lengthy.

Depending on context, one might also use the word 'complex', in the sense of 'difficult', when referring to the amount of time available to consider a disclosure. For example, if a 900 page disclosure needed to be considered in 4 weeks, one might refer that undertaking as 'complex'. If the same 900 page disclosure needed to be considered in 16 weeks, that undertaking might not appropriately be described as 'complex'.

It is not entirely clear on the face of the record of decision what aspect, or aspects, of the investigation of the disclosure Mr Davis is referring to when he states that 'the disclosure is relatively complex.'

Clearly enough, Mc McMullan was able to consider the 'large volume of documents (897 pages)', given that:

- Mr Davis has stated that it took 'some time to consider', which entails that the 'large volume of documents' was considered and that the person who applied for extension of time communicated that point (unless, of course, Mr Davis' statement is not supported by evidence);

- Ms McMullan wrote to me on 29 July 2020 to notify me that, pursuant to paragraph 50(1)(a) of the PID Act, as the principal officers delegate, Ms McMullan was required to investigate the disclosure.

Had Ms McMullan not considered the 'large volume of documents (897 pages)', she would not have been able to conclude that the disclosure needed to be investigated under Part III, Division 2 of the PID Act.

One problem I have with Mr Davis' conclusion that 'the disclosure is relatively complex and involves a large volume of documents (897 pages), which has taken some time to consider' is in relation to his claim about the 'volume' of documents

For the record, I submitted:

- a 270 page disclosure report;

- a 450 page set of supporting materials which I referred to as 'Supporting Materials (Set 1)' throughout the disclosure report (which was broken down into three tranches containing 200 pages, 170 pages and 80 pages so that the document could pass through the Commonwealth Ombudsman email filter);

- a 9 page index of each of the documents contained in 'Supporting Materials (Set 1);

- a 64 page set of supporting materials which I referred to as 'Supporting Materials (Set 2)' throughout the disclosure report; and

- a 2 page letter addressed to the Australian Public Service Commissioner.

By my count, 795 pages of documentation were submitted to Ms Bennet, the authorised officer who allocated the disclosure to the APSC, which is 102 pages fewer than the 897 suggested. But, for the sake of argument, let it be supposed that there are 897 pages of material that Ms McMullan had to consider.

I also note that the body of the disclosure report is typed in 12 point Times New Roman font. Sentences in the disclosure report are 1.5 times spaced.

Of the 270 pages in the disclosure report, 13 pages constitute the table of contents. It can hardly be said that the table of contents in the disclosure report required 'consideration' in any appreciable sense of that word. Moreover, part 7 of that disclosure report, which consisted of 16 pages, was addressed to the Commonwealth Ombudsman. It was not necessary for that part to be given any meaningful consideration on Ms McMullan's part but I will, charitably, not make an issue of it.

The most 'voluminous' document is the set of supporting materials identified as 'Supporting Materials (Set 1)' throughout the disclosure report. 'Supporting Materials (Set 1)' is 450 pages in length. It is constituted by 91 attachments. Each one of those attachments has a title page. So, for example, Attachment 1 is preceded by a title page with 'Attachment 1' emblazoned on the page in 48 point, Times New Roman font. Since there are 91 attachments in 'Supporting Materials (Set 1)', 91 pages of that document are just title pages with not meaningful content for the purposes of the investigation of my disclosure. Those title pages were inserted to make the document more presentable and easier to deal with. Since I was conscious that someone might want to print 'Supporting Materials (Set 1)' when considering the supporting materials, I inserted 41 blank pages, which read

'this page intentionally left blank', into 'Supporting Materials (Set 1)' so that the attachments always began on an odd numbered page.

It could also not be said that the index of the documents that referred to the documents in 'Supporting Materials (Set 1)' contained any appreciable content that required consideration for the purposes of investigating my disclosure.

Assuming 897 pages of documentation were submitted for Ms McMullan's consideration, 154 of those pages (consisting of the 13 pages constituting the table of contents in the disclosure report, the 91 titles pages and 41 'blank' pages contained in 'Supporting Materials (Set 1)', and the 9 page index of the documents contained in 'Supporting Materials (Set 1)') had no appreciable content for consideration. Thus, there would only be 743 pages of content for consideration. More than 17 percent of the purported 'volume' is, for all material intents, non-existent.

If the number of pages of documentation is 795 pages, almost a fifth of the purported 'volume' of documentation is, for all material intents, non-existent.

It would be fallacious to compare the nature of the content presented in the disclosure report as being identical, or even similar, to the nature of the content presented in the supporting materials. The nature of the content presented in the disclosure report was, substantively, about what I believed to be contraventions of Commonwealth laws (specifically, the *Public Service Act 1999* and derivative legislation). The nature of the content presented in 'Supporting Materials (Set 1)', for example, was evidentiary. The materials presented in 'Supporting Materials (Set 1)' provide objective support to assertions made in the disclosure report. The materials presented in 'Supporting Materials (Set 1)' are verificatory in nature. In considering the materials in 'Supporting Materials (Set 1)' one would not need to consider, for example, the cogency of what was presented in the same way that one would need to consider the cogency of arguments presented in the disclosure report. To put it another way, there is consideration and there is consideration, and consideration of the 'Supporting Materials (Set 1)' is of a different order when compared to the task of considering the content of the disclosure report.

The purpose of providing 'Supporting Materials (Set 1)', for example, was to assist the investigator by furnishing the majority of the documentation required to assess the veracity of claims made in the disclosure report. The purpose of collating 'Supporting Materials (Set 1)' was to substantially relieve the investigator of the burden associated with bringing evidence from reputable and objective sources together to conduct a proper investigation. I acknowledge that the supporting materials provided might not constitute the entirety of the evidence required to conduct the investigation but the materials do represent a considerable and, in my opinion, objective body of evidence. Evidently, all that legwork has, to date, only proven useful in securing an extension of time for Ms McMullan. I suppose no good deed goes unpunished.

In any event, when one considers the nature of the content presented in the disclosure report and the nature of the other materials provided in support, it is, in my opinion, hardly appropriate to lump all that documentation together and assert that the 'disclosure … involves a large volume of documents.' At the very least, the assertion that there were 897 pages of documentation to consider is superficial. It is also, functionally, inaccurate. If Mr Davis had just flicked through the documentation, he would have noticed that a considerable number of pages had no meaningful content for the purposes of investigating the disclosure.

Whether Mr Davis did consider the documentation is not clear to me. He should have, even if only by flicking through the materials to get an impression of what was being dealt with and to satisfy himself that there were, in fact, 897 pages of documentation, as he asserts. If he didn't consider the materials in an impressionistic sense, one has to wonder whether he issued his decision with an independent frame of mind. To accept the assertion that there were 897 pages of documentation to consider without an assessment of the nature of the documents to be considered or the actual number of pages would be nothing more than to parrot the assertions of the APSC officer who applied for an extension of time.

Mr Davis states that the documentation took 'some time to consider' on Ms McMullan's part. On the face of the record of decision, it is not clear how long it took Ms McMullan to consider the documents. The omission of this salient fact from the record of decision is regrettable. However long it took Ms McMullan to consider the documentation, Mr Davis felt that an extension of time should be granted. In the absence of the information, I cannot come to an informed conclusion about whether Ms Davis' conclusion was appropriate on the evidence before him but having made a request for the documents, pursuant to the *Freedom of Information Act 1982* (Cth) (see Attachment B to this email), that Mr Davis used to make his decision, I hope to determine that:

- there was, in fact, evidence before Mr Davis which supports his assertion that the documentation took 'some time to consider' on Ms McMullan's part;

- there was, in fact, evidence before Mr Davis that allowed him to reasonably conclude that 'the action already taken to progress [the investigation of the disclosure]' was adequate and that there had not been any unreasonable or unexplained delays on Ms McMullan's part in investigating the disclosure; and

- there was, in fact, evidence before Mr Davis that allowed him to reasonably conclude that the time expended on considering the documentation was reasonable in light of the nature of the content in the documentation considered and its substantive 'volume' (i.e. sans the table of contents, index of documents, title pages and blank pages).

*1.3.2 The allegations relate to a third party, which the APSC will need to consult to assist its investigation*

Mr Davis states, in the record of his decision, that the allegations relate to a third party. Strictly speaking, the allegations relate to the misconduct of several APS employees (including SES employees), an Agency Head and the relevant agency. Thus, Mr Davis' claim is not accurate. I do not know if Mr Davis' claim reflects an unfortunate turn of phrase or a lack of awareness of what the disclosure is about. In any event, it is not clear which third party Mr Davis is referring to.

Mr Davis claims that the 'APSC will need to consult' the third party. It is not clear whether this is an unfortunate turn of phrase or a result of Mr Davis' misapprehension of the substance of the disclosure. The principal officer of the APSC, or his delegate, will need to consult; the agency won't consult anybody.

That consultation is required is a given. The real question is whether consultation will be required as part of the investigation process under the PID Act.

Given that Mr Davis has stated that 'the allegations refer to a third party', I take it that he has some familiarity with the facts. I assume that Mr Davis was aware that the allegations were about contraventions of the *Public Service Act 1999* (Cth) and derivative legislation. Specifically, the allegations relate to contraventions of the Code of Conduct and the APS Employment Principles. If Mr Davis was not aware of the nature of the allegations, one does wonder whether Mr Davis made an adequately informed decision and whether he brought the independence of mind required for making an administrative decision to his decision.

I take it that Mr Davis has a reasonable grasp of the PID Act. I would hate to think otherwise. As Mr Davis would know, subsection 47(1) of the PID Act provides:

> The principal officer of an agency must investigate a disclosure if the handling of the disclosure is allocated to the agency under Division 1.

Subsection 47(3) of the PID Act provides:

> For the purposes of subsection (2), an investigation (or reinvestigation) may include consideration of whether a different investigation (or reinvestigation) should be conducted:
>
> (a) by the agency; or
>
> (b) by another body;
>
> under another law of the Commonwealth.

Subsection 47(4) of the PID Act provides:

> For the purposes of subsection (3), procedures established under a law of the Commonwealth (other than this Act) are taken to be a law of the Commonwealth.

Clause 7.3.42 of the Agency Guide reads as follows:

> When investigating a disclosure concerting an alleged breach of the Code of Conduct under the *Public Service Act 1999*, the principal officer must comply with the procedures established under s 15(3) of that Act (s 53(5)) …

> When investigating a disclosure concerning a possible breach of one of these Codes of Conduct, the principal officer or their delegate would initially investigate the disclosure under the PID Act to assess if there is any substance to the allegation of misconduct …
>
> If the principal officer decides that the disclosure investigation has revealed sufficient prima facie evidence of a breach of the APS Code of Conduct, they should consider whether a different investigation should be conducted under another law of the Commonwealth (s 47(3)). A Code of Conduct investigation in accordance with an agency's s 15(3) procedures is another law of the Commonwealth for this purpose.

It is not clear, on the face of the record of decision, whether Mr Davis turned his mind to the fact that the allegations of contraventions of Commonwealth laws in the disclosure report have been framed as almost entirely, if not entirely, contraventions of the Code of Conduct. Nor is it clear whether Mr Davis sought to determine whether Ms McMullan had decided that her investigations had revealed sufficient prima facie evidence of a breach of the APS Code of Conduct. Nor is it clear whether Mr Davis considered whether it was reasonable to provide an extension of time in light of the fact that it was open to Ms McMullan to determine, in 90 days, that there was sufficient prima facie evidence of a breach of the APS Code of Conduct contained in the disclosure report and in the supporting materials. Nor is it clear whether Mr Davis turned his mind to what 'action [Ms McMullan had] already taken to progress [the investigation of the disclosure]' or 'whether there [had] been any unreasonable or unexplained delays on the part of the agency', although the face of the record of decision would suggest he did not consider these factors (as earlier noted).

It is also worth noting that, on the face of the record of decision, it is not clear whether any suggestion was made to Mr Davis that Ms McMullan planned to investigate the entirety of the allegations under the PID Act (in the sense that Ms McMullan would not, pursuant to paragraph 51(2)(d) of the PID Act, recommend that an investigation be conducted, under procedures established under subsection 15(3) of the *Public Service Act 1999*, into whether APS employees breached the code of conduct under that Act). Nor is it clear whether Mr Davis turned his mind to the fact that it would be open to Ms McMullan to recommend that an investigation be conducted, under procedures established under subsection 15(3) of the *Public Service Act 1999*, into whether APS employees breached the code of conduct under that Act.

Mr Davis ought to know that such a course of action would be open to Ms McMullan. Indeed, as clause 3.2.4.1 of the Agency Guide would suggest, managers and supervisors should be aware of how various policies, such as PID policies and Code of Conduct policies, relate to one another. As a delegate of the Ombudsman, I would hope that it is safe to assume that Mr Davis knew that, under the PID Act, it was open to Ms McMullan to recommend that an investigation be conducted, under procedures established under subsection 15(3) of the *Public Service Act 1999*, into whether APS employees breached the code of conduct under that Act as part of her investigation.

Regrettably, I am not privy to the information that Mr Davis had before him, or turned his mind to, in making his decision, although I hope to gain access to the documentary materials he considered to conclude that it was reasonable to grant an extension of time so that consultations could be carried out as part of Ms McMullan's investigation of the disclosure.

At this stage, it strikes me as unreasonable for Mr Davis to have provided a 90 day extension of time on the ground that Ms McMullan will need to consult. Unless Ms McMullan has suggested to Mr Davis that the consultations will take place with a view to finalising her report (in the sense that Ms McMullan would not, pursuant to paragraph 51(2)(d) of the PID Act, recommend that an investigation be conducted, under procedures established under subsection 15(3) of the *Public Service Act 1999*), Mr Davis ought not to have, in my opinion, granted a 90 day extension of time.

The practical effect of the decision to grant a 90 day extension of time is to grant Ms McMullan 180 days to read a 270 page report, refer to, at most, another 495 pages of supporting materials (assuming that there were 897 pages of documentation) and, in all probability, conclude that there is enough prima facie evidence to investigate the conduct disclosed under procedures established under subsection 15(3) of the *Public Service Act 1999*.

Mr Davis should have been alive to the risk that granting an extension of time would likely serve to delay a decision to investigate the conduct disclosed under procedures established under subsection 15(3) of the *Public Service Act 1999*. Given that the conduct complained about occurred between September 2018 and September 2019, it's possible that by the time any investigation is carried out under procedures established under subsection 15(3) of the *Public Service Act 1999*, the investigator may form the view that too much time has passed between the time of the alleged conduct and the time of investigation for any meaningful investigation to take place.

It is bad enough that I had to wait until the 49th after I submitted my disclosure for Ms Bennet to allocate the disclosure to the APSC. With this decision, at this stage, it is likely that 229 days will pass between the time the

disclosure was made and the finalisation of a report under the PID Act which, in all likelihood, will contain a recommendation for an investigation to take place under another law of the Commonwealth.

Had Mr Davis bothered to contact me to seek my views about the request for an extension of time, I would have drawn these issues to his attention. Instead, I have officers of the Commonwealth agency charged with the promotion of the objects of the PID Act to thank for the unnecessary torpor that has characterised this, increasingly, frustrating undertaking.

*1.3.3 The APSC has experienced a large increase in workload due to the COVID-19 response*

In the absence of the evidence that was before Mr Davis, I cannot come to an informed conclusion about whether Ms Davis' conclusion that the 'APSC has experienced a large increase in workload due to the COVID-19 response' was reasonably open to him on the evidence before him. To better inform myself, I have made a request for the documents, pursuant to the *Freedom of Information Act 1982* (Cth), that Mr Davis used to make his decision.

That being said, there is something fundamentally troubling about this 'factor' that Mr Davis has considered in making his decision. It is my view that Mr Davis has failed to identify the appropriate criterion in the exercise of his power to grant an extension of time. Ultimately, it does not matter whether the 'APSC has experienced a large increase in workload due to the COVID-19 response.' What matters is how the person, or persons, conducting the investigation was, or were, affected by the 'large increase in workload due to the COVID-19 response.'

Consideration of evidence of the APSC experiencing a 'large increase in workload due to the COVID-19 response' would be relevant to, for example, determining whether any delays in investigating the disclosure were reasonable, particularly if Ms McMullan had been redeployed to deal with the 'large increase in workload due to the COVID-19 response.' But 'a large increase in [the APSC's] workload due to the COVID-19 response', even if supported by evidence, does not, of itself, support the proposition that the investigator has, or the investigators have, been affected by the increase in workload. If Mr Davis has concluded that an extension of time was required to investigate the disclosure on the ground that there had been 'a large increase in workload [of the APSC] due to the COVID-19 response', without considering whether the abilities of the investigator, or investigators, to conduct an investigation had been affected by the 'large increase in workload [of the APSC] due to the COVID-19 response', it is my view that Mr Davis' decision is affected by error, which would, in my opinion, be reviewable in the Federal Court or Federal Circuit Court.

In respect of the proposition that a 'large increase in workload due to the COVID-19 response' would be relevant to, for example, determining whether any delays in investigating the disclosure were reasonable, particularly if Ms McMullan had been redeployed to deal with the 'large increase in workload due to the COVID-19 response', I note that an email was sent from the PID@ombudsman.gov.au mailbox on 9 April 2020 setting out the Ombudsman's policy in relation to requests for an extension of time (see Attachment C). In that email, the following is noted:

> Many thanks to those of you who have let us know how your agency is being impacted by COVID-19 and have reviewed current investigations and submitted requests for extensions.
>
> As part of this process, we understand that some agencies have reduced their PID capacity, sometimes significantly.
>
> We appreciate that the need to redeploy resources, either internally or across the APS, will impact on a range of agency functions including PID.
>
> However it is also important to remember the role of the PID scheme in promoting the integrity and accountability of the public service. In times of rapid and unprecedented government action such as these it is especially important that public officials can safely raise concerns about potential wrongdoing or other risks, whether associated with inaction or from acting quickly, and be assured that those concerns will be considered seriously.
>
> Noting the statutory nature of the rights and obligations established by the PID Act for disclosers and agencies alike, we encourage agencies to carefully consider how any reduction in PID capacity and the potential associated risks will be managed, including how the impact of these decisions on the progression of PID matters will be communicated to disclosers.
>
> We will continue to assess extension requests on a case by case basis. However, please note that it may be difficult for our Office to grant extensions of time where we are not confident that an agency will

> be able to progress a particular PID investigation within the timeframe sought in an extension request, or where it appears that an agency's communications with disclosers do not make clear the actual extent of COVID-19 impacts on the agency's PID investigation activities.

Clearly enough, as a matter of policy, even if Ms McMullan was affected by the 'large increase in workload [of the APSC] due to the COVID-19 response', it was incumbent on the APSC (and, specifically, the principal officer or a delegate charged with his functions) to ensure that 'any reduction in PID capacity and the potential associated risks [would] be managed' and that 'the impact of these decisions on the progression of PID matters will be communicated to disclosers'. As I mentioned in a preceding paragraph, the first time that I received any correspondence from an officer at the APSC was on 29 July 2020 and that the correspondence was sent by Ms McMullan, the Australian Public Service Commissioner's delegate. Shorn of salutations and valedictions, the entirety of the correspondence that I have received from anybody at the APSC since the time my disclosure was allocated to the APSC by Ms Bennet on 11 May 2020 is recorded in the following five sentences.

> As a delegate of the principal officer of the Australian Public Service Commissioner, I am writing to notify you under section 50 of the Public Interest Disclosure Act 2013 that I am investigating your disclosure, following allocation by the Commonwealth Ombudsman on 11 May 2020. At this stage, I estimate that the investigation will take 180 days to complete, mainly due to the volume of material provided.
>
> Please note that I am unable to provide you with any other information about the investigation of your disclosure at this time and the progress of an investigation can depend on a range of factors. However, I will contact you if I require any further information from you.
>
> If you have any queries about your disclosure, please direct them to PID@apsc.gov.au.

You will notice that there is no mention of the 'actual extent of COVID-19 impacts on the [APSC's] PID investigation activities.'

Unless Mr Davis was misled by the person who applied for the extension of time and was assured that I had been advised of the 'actual extent of COVID-19 impacts on the [APSC's] PID investigation activities', it seems to me that Mr Davis should have considered whether sufficient evidence had been placed before him to convince him that the 'actual extent of COVID-19 impacts on the [APSC's] PID investigation activities' had been communicated to me. Had Mr Davis made an attempt to contact me, he would have quickly realised that nothing of the sort had occurred.

*1.3.4 Conclusions*

Even without access to the materials that Mr Davis relied on, it is apparent to me, on the face of the record of his decision, that Mr Davis' decision is deficient and, probably, ripe for judicial review. Assuming I am granted access to the documents containing the evidence Mr Davis relied on to draw his conclusions and make his decision, I will be better able to inform myself on the nature of the errors committed by Mr Davis in rendering his decision.

At the very least, the following can be said:

1. Mr Davis' statement that there were 897 pages of documentation to consider is, functionally, inaccurate, which affects his assessment about the 'large volume of documents' that Ms McMullan had to consider.

2. Mr Davis' conclusion that 'the allegations relate to a third party, which the APSC will need to consult to assist its investigation' is inaccurate for the reasons set out above.

3. while it may be true that the 'APSC has experienced a large increase in workload due to the COVID-19 response', that conclusion, of itself, is insufficient to claim that Ms McMullan, the investigator of the disclosure, and those officials supporting her, if any, should have been granted an extension of time to investigate the disclosure; to put it another way, Mr Davis has failed to address the relevant criterion for assessment (namely, whether the abilities of any investigator investigating my disclosure were affected) in his decision to grant Ms McMullan a further 90 days to investigate my disclosure

**2. Requests**

I request that you acknowledge receipt of this email as soon as possible, and no later than Friday, 14 August 2020.

I request that a response to my email of complaint be provided as soon as possible, and no later than Tuesday, 8 September 2020. If you believe that the timeframe for response is unreasonable, please explain, in the email of acknowledgement, why that is unreasonable, provide the date by which you propose to respond and explain why your proposed date is more reasonable than Tuesday, 8 September 2020.

While I expect a response to all the issues I have raised in this email, I would also like you to respond, specifically, candidly and with as much detail as the circumstances warrant, to the issues raised below.

- Keeping in mind an APS employee's duties under the APS Code of Conduct and APS Values and, specifically, his or her duty to demonstrate leadership, trustworthiness and integrity in all he or she does (as to which, see subsection 10(2) of the *Public Service Act 1999*), which entails acting in a way that is right and proper, as well as technically and legally correct or preferable (as to which, see paragraph 14(e) of the *Australian Public Service Commissioner's Direction 2016*), and independent of the facts in this instance, in the context of considering applications for an extension of time, do you think it is good policy for an administrative decision to be made without considering the views of the discloser?

- Keeping in mind an APS employee's duties under the APS Code of Conduct and APS Values and, specifically, his or her duty to demonstrate leadership, trustworthiness and integrity in all he or she does, which entails acting in a way that is right and proper, as well as technically and legally correct or preferable, and independent of the facts in this instance, in the context of considering applications for an extension of time, do you think it is good law for an administrative decision to be made without considering the views of the discloser?

- Keeping in mind Mr Davis' duties under the APS Code of Conduct and APS Values and, specifically, his duty to demonstrate leadership, trustworthiness and integrity in all he does, which entails acting in a way that is right and proper, as well as technically and legally correct or preferable:

  - is it your view that it was preferable for Mr Davis to choose not to solicit my view about the application for an extension of time, in light of his duties as an APS employee, guidance statements contained in the Agency Guide, the probable lack of information provided to him about my views on an extension of time by the APSC official who applied for the extension of time, and the statement contained in Attachment C?

  - assuming no information was communicated to Mr Davis about my views on an extension of time by APSC officer who applied for the extension (because, for example, the relevant section on Form 3 was left blank), would it have been preferable (in the sense of that word in paragraph 14(e) of the *Australian Public Service Commissioner's Direction 2016*) for Mr Davis to ask the APSC official why no information had been communicated?

  - assuming no information was communicated to Mr Davis about my views on an extension of time by APSC officer who applied for the extension, is it your view that it was preferable for Mr Davis to adopt a 'formalist' attitude and undermine the purpose of the statement the 'Ombudsman ***will*** also take into account any views expressed by the discloser about the requested extension' (see clause 9.1.4 of the Agency Guide) by not contacting me to solicit my views?

  - would you, if you were in Mr Davis' shoes at the time he considered the application for the extension of time, have approached the matter differently and, if so, how?

  - would you, if you were in Mr Davis' shoes at the time he considered the application for the extension of time, have made an effort to solicit the discloser's views on the request for an extension of time by the relevant officer at the APSC?

- Keeping in mind Mr Davis' duties under the APS Code of Conduct and APS Values and, specifically, his duty to demonstrate leadership, trustworthiness and integrity in all he does, which entails acting in a way that is right and proper, as well as technically and legally correct or preferable, do you think that Mr Davis should have asked the person who applied for an extension of time whether any attempt had been made to:

  - actually notify me that an application for an extension of time was being made?

  - seek my views on the application for an extension of time that was made by the relevant APSC officer?

- As noted, clause 9.1.4 of the Agency Guide provides:

> … The Ombudsman will take into account a range of other factors including the availability of witnesses; the complexity of the investigation; the action already taken to progress it; and whether there have been any unreasonable or unexplained delays on the part of the agency. The Ombudsman will also take into account any views expressed by the discloser about the requested extension.

Keeping in mind Mr Davis' duties under the APS Code of Conduct and APS Values and, specifically, his duty to demonstrate leadership, trustworthiness and integrity in all he does, which entails acting in a way that is right and proper, as well as technically and legally correct or preferable, do you think that Mr Davis should have:

- taken those factors into account; and

- recorded his consideration of those factors in his record of decision?

Assuming you agree that Mr Davis should have taken those factors into account and recorded his consideration of those factors in his record of decision, do you think Mr Davis' record of decision is deficient, and his reasons insufficient for the purposes of paragraph 52(5)(a) of the PID Act?

- Do you agree that it is good policy for a person making an administrative decision to bring an independent frame of mind to the decision making process?

- Do you agree that, subject to an explicit statutory requirement to the contrary, an administrative decision maker must consider issues before him or her with an independent frame of mind?

- Where there is no 'contradictor', or when an administrative decision maker is making a decision on the basis of the assertions of only one party, is it appropriate for the administrative decision maker to accept the assertions of that one party without regard to any material or evidence in support of that party's claims?

- In the record of his decision, Mr Davis claims that he 'took into account the APSC's advice' on the volume of documentation (i.e. the documentation consisted on 897 pages).

  Keeping in mind that the documentation had originally been submitted to the Ombudsman and that the disclosure was allocated to the APSC by an official in your office, and the fact that my views about the request for an extension of time were not sought, if Mr Davis did not interrogate the claim to determine its truth, did Mr Davis bring the requisite independence to the decision making process?

- In the record of his decision, Mr Davis claims that he 'took into account the APSC's advice' on the volume of documentation (i.e. the documentation consisted on 897 pages).

  Clause 9.1.4 of the Agency Guide provides:

> … The Ombudsman will not automatically grant an application for an extension. Each request is separately considered to determine if the additional time requested is reasonably necessary to ensure that the disclosure is properly investigated …

  If Mr Davis did not interrogate the claim to determine its truth, did he actually 'consider the request' to determine whether the additional time requested was reasonably necessary to ensure that proper investigation of the disclosure? Would it not be fairer to say that he had merely 'rubber stamped' the request because he took an assertion as an accomplished fact?

- In the record of his decision, Mr Davis claims that he 'took into account the APSC's advice' on the volume of documentation (i.e. the documentation consisted on 897 pages). What evidence, other than the assertion that there were 897 pages of documentation, did Mr Davis refer to, to determine that there were 897 pages of documentation?

- Do you think it is accurate to state that Ms McMullan had to consider 897 pages of documentation?

- Keeping in mind Mr Davis' duties under the APS Code of Conduct and APS Values, do you think it was open to him to conclude that blank pages, or title pages (in the sense discussed in part 1.3.1 of this complaint email), or tables of contents required 'consideration', in the sense of that word for the purposes of an investigation under the PID Act?

- Keeping in mind Mr Davis' duties under the APS Code of Conduct and APS Values, do you think it was appropriate for him to conclude that blank pages, or title pages (in the sense discussed in part 1.3.1 of this complaint email), or tables of contents required 'consideration', in the sense of that word for the purposes of an investigation under the PID Act?

- Putting to one side the fundamental inaccuracy of Mr Davis' claim about the 'volume' of documentation, given that the bulk of the documentation (which had originally been submitted to the Commonwealth Ombudsman for allocation) contained verificatory evidence (e.g. lists of employees from annual reports, instruments of appointment to confirm that relevant persons were public servants, notifications of vacancies in the Public Service Gazette etc.) do you think that a reasonable person, in Mr Davis' shoes at the time he considered the application for the extension of time, would have concluded that the 'large volume of documents' warranted a 90 day extension of time in light of the requirements of the PID Act?

- At least on the basis of the record of decision, is it your view that Mr Davis has failed to address the relevant criterion for assessment in respect of the impact of COVID-19 (i.e. should Mr Davis have considered how COVID-19 had affected the abilities of those investigating the disclosure instead of only just considering the APSC's 'large increase in workload due to the COVID-19 response')?

- In your opinion, was the factor that Mr Davis considered (i.e. 'that the APSC has experienced a large increase in workload due to the COVID-19 response) *ultimately* relevant to the question of whether an extension of time should have been granted?

- Keeping in mind Mr Davis' duties under the APS Code of Conduct and APS Values and, specifically, his duty to demonstrate leadership, trustworthiness and integrity in all he does, which entails acting in a way that is right and proper, as well as technically and legally correct or preferable, in light of the statement contained in Attachment C to this email, and in light of the fact that my views on the request for an extension of time had not been communicated to him, is it your view that Mr Davis should have checked whether I had been informed about 'the actual extent of COVID-19 impacts on the [APSC's] PID investigation activities', particularly because that was a ground on which the APSC official who applied for the extension of time was relying?

- Keeping in mind Mr Davis' duties under the APS Code of Conduct and APS Values and, specifically, his duty to demonstrate leadership, trustworthiness and integrity in all he does, which entails acting in a way that is right and proper, as well as technically and legally correct or preferable, in light of the statement contained in Attachment C to this email, and in light of the fact that my views on the request for an extension of time had not been communicated to him, would you, if you were in Mr Davis' shoes at the time he considered the application for the extension of time, have checked whether I had been informed about 'the actual extent of COVID-19 impacts on the [APSC's] PID investigation activities', particularly because that was a ground on which the APSC official who applied for the extension of time was relying?

- Please address the issues raised in part 1.3.2 of this complaint candidly.

- In your opinion, is there anything mentioned in Ms McMullan's correspondence to me, dated 29 July 2020, about an application for an extension of time being made to the Ombudsman?

- Keeping in mind Ms McMullan's duties under the APS Code of Conduct and APS Values and, specifically, her duty to demonstrate leadership, trustworthiness and integrity in all she does, which entails acting in a way that is right and proper, as well as technically and legally correct or preferable, do you think that it would have been preferable (in the sense that word is used in paragraph 14(e) of the *Australian Public Service Commissioner's Directions 2016*) for Ms McMullan to have mentioned the fact that a request for an extension of time was going to be lodged with the Ombudsman?

- Keeping in mind Ms McMullan's duties under the APS Code of Conduct and APS Values and, specifically, her duty to demonstrate leadership, trustworthiness and integrity in all she does, which entails acting in a way that is right and proper, as well as technically and legally correct or preferable, do you think that Ms McMullan should have mentioned the fact that a request for an extension of time was going to be lodged with the Ombudsman?

- Keeping in mind Ms McMullan's duties under the APS Code of Conduct and APS Values and, specifically, her duty to demonstrate leadership, trustworthiness and integrity in all she does, which entails acting in a way that is right and proper, as well as technically and legally correct or preferable, do you think that Ms McMullan has complied with clause 8.3 of the APSC Public Interest Disclosure Procedures, issued pursuant to section 59 of the PID Act by the Australian Public Service Commissioner on 21 September 2018?

- Keeping in mind Ms McMullan's duties under the APS Code of Conduct and APS Values and, specifically, her duty to demonstrate leadership, trustworthiness and integrity in all she does, which entails acting in a way that is right and proper, as well as technically and legally correct or preferable, is it your view that it was preferable (in the sense of that word used in paragraph 14(e) of the *Australian Public Service Commissioner's Directions 2016*) for Ms McMullan to ignore the prescription, set out in clause 9.1.4 of the Agency Guide, to notify me that she was going to 'apply for an extension, and take the opportunity to explain why it is required and the steps that need to be taken to complete the investigation?'

- While Mr Davis did not know (because he failed to make an effort to contact me for my views about the application for an extension of time), assuming you accept that:

  - the only communication I have received from an official at the APSC was the email sent on 29 July 2020 (see Attachment A to this email); and

  - that I have not been advised about the 'actual extent of COVID-19 impacts on the [APSC's] PID investigation activities'; and

  - I have, to date, not been provided with the information set out in subsection 9(1) of the Public Interest Disclosure Standard 2013;

  do you think that a reasonable public servant would consider the approach taken by Ms McMullan to the investigation of my disclosure has been substandard? If so, how is it substandard?

- Based on the information before you, do you think that Ms McMullan has conducted her investigation of my disclosure satisfactorily? Would you accept, as an accomplished fact, my assertions about not receiving correspondence pursuant to subsection 9(2) of the Public Interest Disclosure Standard or being first contacted on the 79th day after the disclosure was allocated to the APSC? If not, why not?

- If Mr Davis was in any way misled by the person who applied for the extension of time (e.g. about the volume of documentation), what do you propose to do about it?

**3. Concluding remark**

I would like you to know that, from the start, my expectations about how my public interest disclosure would be investigated were qualified by, what I think were, reservations about the 'ardour for integrity' possessed by those who would investigate the disclosure. Having said that, I had not expected that I could be as disappointed as I am with those involved with this process.

For the sake of the public service, I would like to hope that my experiences are the exception to the norm. Over to you to give me reason enough.

Sincerely,

P301175402J

Dear Ms Witham

On Sunday, 9 August 2020, I recorded a complaint about Mr Davis' decision to grant an extension of time to Ms McMullan of the APSC pursuant to the *Public Interest Disclosure Act 2013*. That complaint was referred to you for consideration.

I requested that a response to my complaint be provided as soon as possible and, in any event, by Tuesday, 8 September 2020. I requested that, should the deadline be considered unreasonable, an explanation be provided as to why the deadline was unreasonable.

On Wednesday, 12 August 2020, you wrote to me and acknowledged receipt of my complaint.

On Monday, 17 August 2020, I wrote to you and noted that, since you did not raise any objections to the reasonableness of my request for a response by Tuesday, 8 September 2020, I assumed that a response would be provided by Tuesday, 8 September 2020.

On Tuesday, 18 August 2020, you wrote to me and noted:

> I will be looking into your service complaint relating to our office granting an extension to the agency handling your PID (APSC). I will be considering the extent to which we followed our processes in this regard and looking for any areas for service improvement. I will endeavour to complete this review in the next two to three weeks and will get back to you with any outcomes.

More than three weeks have passed since you wrote to me on Tuesday, 18 August 2020. The deadline of 8 September 2020 has also passed.

As a matter of courtesy, why was I not notified that you would not be able to meet the deadline of 8 September 2020?

When do you anticipate that I will be provided with a response to my complaint and why have thirty days from the date that I made my complaint proven insufficient to respond to my complaint?

Sincerely

P301175402J

Dear Mr Davis,

I refer to your letter of decision dated 7 August 2020 in which you recorded your decision to grant the Australian Public Service Commission (**APSC**) an extension of time pursuant to section 52 of the *Public Service Disclosure Act 2013* (Cth) (**PID Act**).

In your record of decision, you note:

> If upon the finalisation of the investigation and receipt of the investigation report you are unhappy with the outcome, it is open to you to make a complaint to our Office about the APSC's handling of your PID.

In your record of decision, you also note that your contact email address is PID@ombudsman.gov.au and that the provided email address is your preferred point of contact.

On Sunday, 9 August 2020, I wrote to you noting my disappointment with your decision and requesting that my complaints about your decision be referred to your supervisor. I had hoped that my concerns would be dealt with internally. Regrettably, the person who was charged with considering the complaints made, Ms Witham, has failed to substantively respond to my complaints.

I am disappointed with Ms Witham's failure to respond to my complaints.

Since there appears to be no progress with the complaints I have made, I feel compelled to write to you to seek a statement pursuant to subsection 13(1) of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). I request that you set out your findings on material questions of fact, referring to the evidence or other material on which those findings were based, and give reasons for the decision you made on 7 August 2020.

I do note that you would be at liberty to refuse to prepare a written statement pursuant to subsection 13(5) of the ADJR Act but, for what it's worth, given the state of the record of decision furnished on 7 August 2020 and my attempts to resolve this matter through internal processes, such refusal might not be received favourably.

However you choose to respond, a failure to provide a statement under subsection 13(1) of the ADJR Act, in which you set out the evidence and other material on which you made findings on materials questions of fact, would not necessarily preclude me from subpoenaing the relevant materials if I choose to bring these issues before the Federal Circuit Court or the Federal Court because of an unwillingness to substantively acknowledge my concerns and complaints through non-litigious mechanisms.

Please acknowledge receipt of this email as soon as possible and no later than 12 pm on Friday, 11 September 2020.

Sincerely,

P301175402J

**ADJR 13 Reasons for decision may be obtained**

(1) Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Federal Court or the Federal Circuit Court under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him or her to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

(2) Where such a request is made, the person who made the decision shall, subject to this section, as soon as practicable, and in any event within 28 days, after receiving the request, prepare the statement and furnish it to the person who made the request.

(3) Where a person to whom a request is made under subsection (1) is of the opinion that the person who made the request was not entitled to make the request, the first-mentioned person may, within 28 days after receiving the request:

(a) give to the second-mentioned person notice in writing of his or her opinion; or

(b) apply to the Federal Court or the Federal Circuit Court under subsection (4A) for an order declaring that the person who made the request was not entitled to make the request.

(4) Where a person gives a notice under subsection (3), or applies to the Federal Court or the Federal Circuit Court under subsection (4A), with respect to a request, the person is not required to comply with the request unless:

(a) the Federal Court or the Federal Circuit Court, on an application under subsection (4A), declares that the person who made the request was entitled to make the request; or

(b) the person who gave the notice under subsection (3) has applied to the Federal Court or the Federal Circuit Court under subsection (4A) for an order declaring that the person who made the request was not entitled to make the request and the court refuses that application;

and, in either of those cases, the person who gave the notice shall prepare the statement to which the request relates and furnish it to the person who made the request within 28 days after the decision of the court.

(4A) The Federal Court or the Federal Circuit Court may, on the application of:

(a) a person to whom a request is made under subsection (1); or

(b) a person who has received a notice under subsection (3);

make an order declaring that the person who made the request concerned was, or was not, entitled to make the request.

(5) A person to whom a request for a statement in relation to a decision is made under subsection (1) may refuse to prepare and furnish the statement if:

(a) in the case of a decision the terms of which were recorded in writing and set out in a document that was furnished to the person who made the request—the request was not made on or before the twenty-eighth day after the day on which that document was so furnished; or

(b) in any other case—the request was not made within a reasonable time after the decision was made;

and in any such case the person to whom the request was made shall give to the person who made the request, within 14 days after receiving the request, notice in writing stating that the statement will not be furnished to him or her and giving the reason why the statement will not be so furnished.

(6) For the purposes of paragraph (5)(b), a request for a statement in relation to a decision shall be deemed to have been made within a reasonable time after the decision was made if the Federal Court or the Federal Circuit Court, on application by the person who made the request, declares that the request was made within a reasonable time after the decision was made.

(7) If the Federal Court or the Federal Circuit Court, upon application for an order under this subsection made to it by a person to whom a statement has been furnished in pursuance of a request under subsection (1), considers that the statement does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision, the court may order the person who furnished the statement to furnish to the person who made the request for the statement, within such time as is specified in the order, an additional statement or additional statements containing further and better particulars in relation to matters specified in the order with respect to those findings, that evidence or other material or those reasons.

(8) The regulations may declare a class or classes of decisions to be decisions that are not decisions to which this section applies.

(9) Regulations made under subsection (8) may specify a class of decisions in any way, whether by reference to the nature or subject matter of the decisions, by reference to the enactment or provision of an enactment under which they are made, by reference to the holder of the office by whom they are made, or otherwise.

(10) A regulation made under subsection (8) applies only in relation to decisions made after the regulation takes effect.

(11) In this section, ***decision to which this section applies*** means a decision that is a decision to which this Act applies, but does not include:

(a) a decision in relation to which section 28 of the *Administrative Appeals Tribunal Act 1975* applies;

(b) a decision that includes, or is accompanied by a statement setting out, findings of facts, a reference to the evidence or other material on which those findings were based and the reasons for the decision; or

(c) a decision included in any of the classes of decision set out in Schedule 2.

**13A Certain information not required to be disclosed**

(1) This section applies in relation to any information to which a request made to a person under subsection 13(1) relates, being information that:

(a) relates to the personal affairs or business affairs of a person, other than the person making the request; and

(b) is information:

(i) that was supplied in confidence;

(ii) the publication of which would reveal a trade secret;

(iii) that was furnished in compliance with a duty imposed by an enactment; or

(iv) the furnishing of which in accordance with the request would be in contravention of an enactment, being an enactment that expressly imposes on the person to whom the request is made a duty not to divulge or communicate to any person, or to any person other than a person included in a prescribed class of persons, or except in prescribed circumstances, information of that kind.

(2) Where a person has been requested in accordance with subsection 13(1) to furnish a statement to a person:

(a) the first-mentioned person is not required to include in the statement any information in relation to which this section applies; and

(b) where the statement would be false or misleading if it did not include such information—the first-mentioned person is not required by section 13 to furnish the statement.

(3) Where, by reason of subsection (2), information is not included in a statement furnished by a person or a statement is not furnished by a person, the person shall give notice in writing to the person who requested the statement:

(a) in a case where information is not included in a statement—stating that the information is not so included and giving the reason for not including the information; or

(b) in a case where a statement is not furnished—stating that the statement will not be furnished and giving the reason for not furnishing the statement.

(4) Nothing in this section affects the power of the Federal Court or the Federal Circuit Court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the court.

Ombudsman Act s6(4)(a)

(4)Where, before the Ombudsman commences, or after the Ombudsman has commenced, to investigate action taken by a Department or by a prescribed authority, being action that is the subject matter of a complaint, the Ombudsman becomes of the opinion that adequate provision is made under an administrative practice for the review of action of that kind taken by that Department or prescribed authority, the Ombudsman may decide not to investigate the action or not to investigate the action further, as the case may be:

(a) if the action has been, is being or is to be reviewed under that practice at the request of the complainant

PIDAct s 52

**52 Time limit for investigations under this Division**

(1) An investigation under this Division must be completed within 90 days after the relevant disclosure was allocated to the agency concerned.

(2) The investigation is ***completed*** when the principal officer has prepared the report of the investigation.

(3) If the agency is not the IGIS or an intelligence agency, the Ombudsman may extend, or further extend, the 90-day period by such additional period (which may exceed 90 days) as the Ombudsman considers appropriate:

(a) on the Ombudsman's own initiative; or

(b) if the agency is not the Ombudsman—on application made by the principal officer of the agency; or

(c) on application made by the discloser.

Ombudsman Act s 5

**5 Functions of Ombudsman**

(1) Subject to this Act, the Ombudsman:

(a) shall investigate action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department, or by a prescribed authority, and in respect of which a complaint has been made to the Ombudsman; and

(b) may, of his or her own motion, investigate any action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department or by a prescribed authority; and

(c) with the consent of the Minister, may enter into an arrangement under which the Ombudsman will perform functions of an ombudsman under an ombudsman scheme established in accordance with the conditions of licences or authorities granted under an enactment.